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Supreme Court of the United States

OCTOBER TERM, 1957.

No. 446

MISSISSIPPI VALLEY BARGE LINE COMPANY,
Petitioner,

versus

T. L. JAMES & CO., INC., ET AL.,
Respondents.

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

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ARGUMENT

May It Please the Court:

Having succeeded in blinding both the District Court and the Court of Appeals to the issues involved in this litigation and the legal principles and jurisprudence applicable thereto, the respondents are pursuing their obfuscating tactics in this Court.

In their brief in opposition to the petition for writs of certiorari, the burden of respondents' contention is that this is a factual case, limited in importance to the parties to the litigation and involving no legal issues af-

fecting the public generally, a contention which their own brief readily refutes, because therein the respondents by their admission put at rest any factual issue.

The petitioner is here urging that the respondents desired to have the cargo of contractors' equipment moved from New Orleans to Cheatham Dam, Tennessee, for the purpose of using it there, and that such movement constituted affreightment notwithstanding the fact that the respondents furnished the barge whereon the cargo was laden, pursuant to Section 314 of Part III of the Interstate Commerce Act.[1] Respondents admit that their purpose was to secure the transportation of the cargo of contractors' equipment from New Orleans to Cheatham Dam, Tennessee, and not to tow the Barge LA BELLE on a round trip from New Orleans to Cheatham Dam and return to New Orleans. They say in their brief (page 7):

> "Admittedly, Respondents desired to get the contractors equipment to Cheatham Dam so that a cement plant could be dismantled. As a means of getting this equipment to Cheatham Dam they charter[illegible]nd furnished a barge and contracted with Petitioner to move the said barge up the River."

This, say the respondents, raises only a question of fact, which the District Court and the Court of Appeals have resolved against the petitioner by their respective findings that such a movement constituted towage, but we submit that whether or not this movement constituted towage or affreightment presents a complex question of law and an interpretation of Part III of the Interstate Commerce Act which this Court has never resolved.

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[1] 49 U.S.C. 914, reproduced in the Appendix to the petition for writs of certiorari, page 64.

What the respondents are here urging is, in effect, that notwithstanding the requirements of Part III of the Interstate Commerce Act, a shipper may first charter a barge for the transportation of a commodity the transportation of which is regulated by Part III of the Interstate Commerce Act, from a barge owner, here the McDonough Construction Company, not certificated by the Interstate Commerce Commission as a "contract carrier by water" as required by Section 302(e) of Part III of the Interstate Commerce Act,[2] thereby being a party to a violation of that section of the Interstate Commerce Act, and then load on the barge this regulated cargo and contract for the transportation of the cargo by a carrier, whether certificated or not, which does not have on file with the Interstate Commerce Commission any tariff governing the movement of the cargo and prescribing any rate therefor. That is precisely the effect of the decisions of the District Court and of the Court of Appeals in this litigation. If that be correct, then Section 302(e) of Part III of the Interstate Commerce Act, *supra*, is meaningless, Sections 306(a) and 306(c) of Part III of the Interstate Commerce Act,[3] which respectively require common carriers by water to file with the Commission and print and keep open for inspection their tariffs and not to vary therefrom, become absolutely futile, and the whole of Part III of the Interstate Commerce Act, purporting to regulate the affreightment of certain commodities by water, becomes a sham. Any shipper either ignorant of the requirements of Part III of the Interstate Commerce Act or desirous of evading its requirements and securing for himself affreightment

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[2] 49 U.S.C. 902, reproduced in the Appendix to the petition for writs of certiorari, page 61.

[3] 49 U.S.C. 906, reproduced in the Appendix to the petition for writs of certiorari, page 63.

on terms and conditions and at rates not prescribed by the Interstate Commerce Commission, will then be free to charter a barge willy-nilly and to contract for such affreightment free of any of the restrictions of the Interstate Commerce Act.

This, say the respondents, is a matter in which the public has no interest. If that be a correct statement, then the public has no interest in the regulation of affreightment of commodities by water and the whole theory of the Interstate Commerce Act, that it is essentially to prevent discrimination, becomes just a solemn mockery.

Not only is the interest of the public in this question of vital importance generally, but specifically it is of even more vital importance to those large segments of the public which constitute shippers by water and which constitute the industry engaged in the carriage of cargo by water. These carriers have been and still are conducting their businesses on the theory that the transportation of cargoes on non-self-propelled barges with the use of towboats owned by them constitutes affreightment as to such cargoes, and that in performing such affreightment they have the benefit of Section 3 of the Harter Act, regardless of the ownership of the barges. Yet, say the respondents in their brief (page 11):

> "Obviously, it was not the intention of Congress to afford the owner of a towing vessel the protection of the Act when the barge being towed was furnished and/or was actually being physically maintained by its own owner or some other third party and there is no basis whatsoever, considering the history and application of the Act, for supposing that Congress had any intention of

providing for the exercise of due diligence by a carrier in making seaworthy vessels or equipment owned or operated by others."

Obvious to whom? Certainly not to the water carriers. On the contrary they urge that it was obvious that Congress did intend to extend to them the protection of Section 3 of the Harter Act regardless of the ownership of the dumb barge on which the cargo may be loaded. How else could two or more carriers participate in the affreightment of a cargo moving on a through bill of lading over a route which requires the participation of more than one carrier? Obviously, the barge will be owned by one of the participating carriers, so that in order for any other participating carrier to engage in affreightment the cargo would have to be shifted to a barge of the ownership of the next participating carrier as each carrier reaches the end of its certificated route.

The jurisdiction of the courts to declare invalid provisions of the tariff on file with and published by the Interstate Commerce Commission is dealt with in full in the petition, and the respondents's objections to our contentions require no further comments here.

CONCLUSION

In conclusion, we respectfully submit that the matters here presented for determination are not questions of fact but on the contrary are complex questions of law in which the public generally, and particularly the shippers by water and carriers engaged in the transportation of commodities by water with the use of non-self-propelled barges and towboats, have a vital interest; that these questions have not yet been considered by Your

Honors; and accordingly that Your Honors should grant the writs of certiorari prayed for herein and put at rest these questions.

Respectfully submitted,

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